

In the Matter of License No. 256995 Merchant Mariner's Document No.
Z-823524 and all other Seaman Documents
Issued to: FREDERICK K. GORBERT

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1459

FREDERICK K. GORBERT

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 16 January 1964, an Examiner of the United States Coast Guard at New Orleans, Louisiana suspended Appellant's seaman documents for three months outright plus three months on twelve months' probation upon finding him guilty of misconduct. The two specifications found proved allege that while serving as Third Mate on board the United States SS OVERSEAS JOYCE under authority of the license above described, on 1 November 1963, Appellant engaged in a fight with radio operator Brown, and assaulted and battered the radio operator with a hammer.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of three witnesses in addition to certified copies of entries in the official Logbook and extracts from the Shipping Articles for the voyage.

In defense, Appellant offered in evidence his testimony and that of another witness.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and two specifications had been proved.

FINDINGS OF FACT

On 1 November 1963, Appellant was serving as Third Mate on board the United States SS OVERSEAS JOYCE and acting under authority of his license while the ship was at sea.

Some friction had developed between Appellant and radio

operator Brown during the preceding three weeks because Brown kept the volume on his radio turned up in the radio shack and refused to turn it down when so requested by Appellant. The loud noise from the radio annoyed Appellant while he was on watch since the doorways to the radio shack and the chartroom faced each other across a passageway.

About 1700 on 1 November, Appellant relieved the Second Mate for supper. When Brown refused to lower the volume of his radio, Appellant closed the radio shack door. Brown opened the door and addressed Appellant with obscene language for having closed the door. Appellant called the Master concerning Brown's conduct but before the Master reached the bridge, Brown left for supper. He again addressed Appellant with obscene language as he went down the ladder. The Master did not talk to Brown before Appellant's 2000-to-2400 watch.

At 1950, Appellant went to the bridge to relieve the Second Mate. Brown turned up the volume of his radio just as Appellant stepped into the chartroom. Brown agreed to turn the radio volume down at the request of the Second Mate and, at the same time Brown directed obscene language toward Appellant.

While Appellant and the Second Mate were still in the chartroom, Brown entered and Appellant told him to get out. When Brown refused to leave and said only the Captain could order him out of the chartroom, Appellant challenged Brown to take off his glasses. Brown then went to the radio shack, obtained a hammer, and returned to the chartroom doorway. Appellant was closing the chartroom door when he was called several obscene names by Brown. Appellant opened the door, grabbed Brown, and was struck on the head with the hammer before he managed to take it away from Brown.

The Master heard the commotion and went to the bridge. When he arrived, Brown was on the deck in the passageway and Appellant was astride of Brown hitting him on head with the hammer as he struggled violently to get free. The Master grabbed Appellant's wrist and the Second Mate took the hammer from Appellant. The two men were separated by the Master and Second Mate. Both were bleeding from head lacerations for which they received medical treatment but neither was incapacitated to perform his duties. Appellant is a much taller and larger man than Brown.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that Appellant did not attack Brown

despite severe provocation but Brown attacked Appellant with a hammer after Appellant took every possible step to avoid violence; Appellant used only sufficient force to subdue Brown, as he struggled wildly, rather than using excessive force as found by the Examiner; Appellant's challenge to Brown to take off his glasses was not a cause of the fight which followed solely because Brown obtained a hammer and moved toward Appellant with it.

In conclusion, it is respectfully submitted that the Examiner's decision should be reversed or the order mitigated to an official reprimand due to the extreme provocation by Brown.

APPEARANCE: Kierr and Gainsburgh of New Orleans, Louisiana by
 Theodore J. Pfister, Jr., Esquire, of Counsel

OPINION

The Examiner's and the above findings of fact are a fair representation of the events in terms of the testimony given by Appellant and the only other defense witness. These findings support the allegations contained in both specifications.

The facts, that Appellant challenged Brown and shortly thereafter grabbed him at the chartroom doorway, conclusively establish that Appellant willingly engaged in the fight. In addition, the challenge by Appellant evidently induced the radio operator to get the hammer in view of the great disparity in the size of the two seamen. The Examiner, who saw both of them, stated that Brown was no match physically for Appellant.

There is no doubt that Appellant exercised excessive force when he was holding Brown on the deck and hitting him with the hammer even though the blows were not hard enough to cause serious injuries. It is evident from the comparative sizes of the two that Appellant did not need to use a dangerous weapon to repel an attack by Brown. In fact, any danger to Appellant had ended by the time Appellant took possession of the hammer and had Brown on the deck.

As pointed out by the Examiner in his decision, Appellant's own testimony indicates the reason why Appellant used the hammer. Although Appellant testified that he felt it was necessary to hit Brown with the hammer in order to subdue him while he was struggling violently on the deck, this is contradicted by Appellant's testimony that he thought if Brown was man enough to use the language with which he addressed Appellant and was man enough to use a hammer on somebody, Brown was man enough to have the same hammer used on him.

Regardless of the admittedly extreme provocation by Brown, his

words and loud radio did not justify Appellant's conduct, especially since he was serving as a licensed officer. Breaches of discipline such as this are more serious offenses when committed by licensed seamen than by unlicensed crew members, because the former serve in positions of greater authority and responsibility.

Appellant had the responsibility and ample opportunity to avoid this fight. While on his way to the bridge, Appellant saw the Master sitting at his desk and could have mentioned the matter then. When the same difficulties occurred after Appellant reached the chartroom, he could have again telephoned the Master and kept the chartroom door closed until the Master arrived to correct the situation.

Under the circumstances of this case, the order of the Examiner is not considered to be too severe. Hence, it will not be modified.

ORDER

The order of the Examiner dated at New Orleans, Louisiana, on 16 January 1964, is AFFIRMED.

E. J. ROLAND
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 1st day of July 1964.